

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of

AMERICAN ELECTRIC POWER)	
AND ITS SUBSIDIARIES APPALACHIAN)	
POWER COMPANY, INDIANA MICHIGAN)	
POWER COMPANY, KENTUCKY POWER)	
COMPANY, KINGSPORT POWER COMPANY,)	
OHIO POWER COMPANY, PUBLIC SERVICE)	
COMPANY OF OKLAHOMA AND)	CASE 9-CA-095384
SOUTHWESTERN ELECTRIC POWER)	
COMPANY)	
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, SYSTEM)	
COUNCIL U-9)	
AND LOCALS 329, 386, 696, 738, 876, 934, 978,)	
1002, 1392, AND 1466, AFL-CIO)	

**REPLY MEMORANDUM IN SUPPORT OF
RESPONDENTS' MOTION TO DISMISS**

The Responses of Counsel for the Acting General Counsel (“Acting General Counsel”) and of the Charging Parties to Respondents’ Motion to Dismiss are unpersuasive and do not alter Respondents’ entitlement to dismissal of these proceedings under *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs., Inc.*, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013) and *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (2013). Accordingly, for the reasons stated in Respondents’ Motion and herein, the instant proceeding should be dismissed.

The Acting General Counsel and the Charging Parties both contend in their responses to Respondents' Motion that the court in *Kitsap* misinterpreted the requirements of the Federal Vacancies Reform Act ("FVRA") 5 U.S.C. §3345, *et seq.*, in reaching its decision that Acting General Counsel Lafe Solomon was not validly appointed during the period pertinent to the instant proceeding. However, it is the Acting General Counsel and the Charging Parties who misinterpret the clear meaning of § 3345.

Section 3345 states in pertinent part:¹

- (a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—
 - (1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;
 - (2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or
 - (3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—
 - (A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
 - (B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.
- (b) (1) Notwithstanding subsection (a)(1), **a person may not serve as an acting**

¹ Section 3345(c) of the FVRA concerns officers who have been nominated by the President for reappointment. This provision has no bearing on the issue herein.

officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(Emphasis added).

In essence, the FVRA provides two categories of persons who may validly temporarily fill a vacancy in an office of an Executive agency whose appointment is required to be made by the President, by and with the advice and consent of the Senate. The first category are the three subcategories described in § 3345(a), and the second category is described in § 3345(b). Section 3345(b) applies in instances where the President has nominated the person in question to the Senate for appointment to the office. Section 3345(a) applies in instances where the President has not nominated the person in question to the Senate for appointment to the office. It is no more complicated than that.

It is undisputed that the President nominated Mr. Solomon for Senate approval for

the position of General Counsel of the NLRB when the 112th session of Congress commenced on January 5, 2011. As the court in *Kitsap* correctly concluded, once the President nominated Mr. Solomon for the position of General Counsel, Mr. Solomon could only properly serve as the Acting General Counsel if he met the requirements of § 3345(b). *Kitsap*, 2013 U.S. Dist. LEXIS 114320 at *3-4. Section 3345(b) plainly and unambiguously states that, if the person in question has been nominated by the President for Senate approval, such person may “not serve as the acting officer for an office” for which he or she has been nominated unless, during the preceding 365-day period, such person served in the position of first assistant to the office of such officer for at least 90 days. Mr. Solomon did not serve a single day as the first assistant to the NLRB’s General Counsel during the 365-day period prior to his nomination to the office of General Counsel. Therefore, under the plain and unambiguous terms of § 3345(b), Mr. Solomon’s appointment as Acting General Counsel for the NLRB was invalid for the period from January 5, 2011 to August 1, 2013.²

At page 5 of their Memorandum in Opposition, the Charging Parties assert that neither the court in *Kitsap* nor Respondents in their Motion have provided authority to support their position that Mr. Solomon became ineligible to hold the position of Acting General Counsel when the President nominated him for the position of General Counsel. The authority for Respondent’s position, and presumably the court’s in *Kitsap*, is the clear language of the FVRA. As noted above, the FVRA specifically provides that a person who has been nominated for the office by the President “may not serve as an acting officer for an office under this section” unless he has served as the first assistant to

² On August 1, 2013, the President withdrew his nomination of Mr. Solomon. (159 Cong Rec S 6263 (Aug. 1, 2013)).

the office of such officer for at least 90 days during the preceding 365-day period. The FVRA provides no exception to this requirement.

The Acting General Counsel's and the Charging Parties' Responses to Respondents' Motion contain considerable discussion of § 3345(a). However, as noted above, § 3345(a) applies only in situations where the person in question has not been nominated by the President for Senate confirmation. Section 3345(a) does not apply if the person in question has been nominated, which is clearly the case at hand herein.

At page 4 of his Response, the Acting General Counsel cites legislative history as supporting his interpretation of §3345(b)(1). However, legislative history is irrelevant if the law itself is plain and unambiguous. *See, e.g., Bedroc, Ltd., LLC v. United States*, 541 U.S. 176, 187 n.1 (2004) ("Chief Justice Marshall in 1805 stated the principle that definitively resolves this case nearly 200 years later: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' *United States v. Fisher*, 2 Cranch 358, 399, 2 L. Ed. 304.'").

At page 3 of their Memorandum in Opposition, the Charging Parties state that the Board has already specifically found that "the Acting General Counsel was properly appointed under the Vacancies Act and cites *Belgrove Post Acute Care Center*, 359 NLRB No. 77 n. 1 (Mar. 13, 2013). Although the specific quote is technically accurate, it is taken entirely out of context.

In *Belgrove*, one of the employer's arguments was that FVRA does not apply to the office of the General Counsel because there is a specific procedure under the NLRA for filling vacancies, namely § 3(d) of the National Labor Relations Act ("NLRA"), 29

U.S.C. § 153(d). The employer argued that § 3(d) of the NLRA was the exclusive method for filling vacancies in the NLRB's General Counsel position. In *Belgrove*, the Board rejected this argument, ruled that § 3(d) of the NLRA was not exclusive, and that FVRA provides a valid "alternative procedure." This was the extent of the Board's analysis on the validity of appointment issue. The Board's decision does not provide any analysis whatsoever concerning the issue presented herein and in *Kitsap* – whether Mr. Solomon's appointment at the times relevant to this proceeding actually complied with the specific requirements of the FVRA. For the reasons explained above and in Respondents' Motion, Mr. Solomon's appointment at the times relevant to this proceeding did not comply with the requirements of the FVRA. Accordingly, Acting General Counsel Solomon lacked any authority to issue a complaint himself or to delegate such power to Regional Director Muffley. *See Kitsap* at *4.

CONCLUSION

For the reasons stated in herein and in Respondents' Motion to Dismiss, Respondents respectfully request that the Board dismiss all proceedings herein against them and vacate the Decision of Administrative Law Judge Eric M. Fine. At the time the Complaint herein was issued and at all other times pertinent to this proceeding, Acting General Counsel Solomon was invalidly appointed under Section 3 (d) of the Act and under the applicable provisions of the FVRA, and lacked any authority to issue a complaint himself or delegate such power to Regional Director Muffley. The Board, at the time the Complaint was issued, similarly lacked authority to pursue any proceedings against Respondents under *Noel Canning* and its progeny. Therefore, all proceedings against Respondents in this matter should be dismissed.



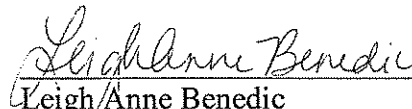
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2013, I served the attached
Reply Memorandum in Support of Respondents' Motion to Dismiss on all parties by
electronic mail to the following addresses:

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